

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 22, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2016AP1312**

**Cir. Ct. No. 2016SC2312**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**DANIEL W. BRUCKNER,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MIKE MCGRATH,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Waukesha County:  
KATHRYN W. FOSTER, Judge. *Affirmed.*

¶1 REILLY, P.J.<sup>1</sup> Mike McGrath, pro se, appeals from an order granting a judgment of eviction in favor of his landlord, Daniel W. Bruckner. We affirm.

¶2 Bruckner rented McGrath an apartment located on Main Street in Menomonee Falls, Wisconsin, and alleges that McGrath failed to pay \$565 in rent, due on May 1, 2016. On May 20, 2016, Bruckner issued a 5-Day Notice to Pay Rent or Vacate to McGrath.<sup>2</sup> McGrath “did not pay or move.” In response, Bruckner issued a 28-Day Notice Terminating Tenancy to McGrath on May 25, 2016. On May 26, 2016, Bruckner filed a small claims summons and complaint against McGrath, seeking eviction. Bruckner sought a claim for \$565 in past due rent and a judgment of eviction. McGrath answered the complaint on June 6, 2016, claiming that he “did not fail to pay rent when due-or-violate the rental agreement as alleged.”

¶3 The eviction hearing was held on June 15, 2016. According to automated court records, Bruckner agreed to retain McGrath’s security deposit in exchange for the unpaid rent and dismiss any claim for damages if McGrath vacated the property by June 30, 2016. The circuit court accepted the agreement on behalf of McGrath and ordered him to vacate the property. The court entered a

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

<sup>2</sup> Bruckner also issued McGrath a 5-Day Notice to Pay Rent or Vacate on April 25, 2016, for unpaid rent due on April 1, 2016.

judgment of eviction and a writ of restitution/disposal of personal property.<sup>3</sup> McGrath voluntarily moved prior to the execution of the writ.

¶4 Under WIS. STAT. § 704.19(1), (2), “[a] periodic tenancy” and “[a] tenancy at will” may “be terminated by either the landlord or the tenant only by giving to the other party written notice.”<sup>4</sup> As relevant here, notice must be given at least twenty-eight days before the date of termination. *See* § 704.19(3). In this case, McGrath does not challenge that Bruckner provided him with a twenty-eight-day notice of termination on May 25, 2016. The notice informed McGrath that “this notice terminates your tenancy and requires you ... to vacate the premises ... on or before June 30, 2016.” On these undisputed facts, we conclude that Bruckner provided McGrath with proper notice of termination of his tenancy.

¶5 The basis of McGrath’s argument on appeal is that the circuit court erred in ordering eviction as “[t]he basic math showed that I had paid the rent.” As we are an error correcting court, we will uphold the circuit court’s findings of fact unless clearly erroneous. WIS. STAT. § 805.17(2) (“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.”). In this

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<sup>3</sup> According to automated court records, the judgment of eviction was granted on June 15, 2016, and the writ was stayed until July 1, 2016. The writ of restitution/disposition of personal property included in the record states that the judgment of eviction was entered on July 5, 2016, the same day the writ was signed.

<sup>4</sup> The record does not include evidence of a lease agreement or an oral rental agreement, except to suggest that McGrath owed \$565 in rent per month. We will assume for the purposes of this decision that WIS. STAT. § 704.19 is applicable.

case, the record on appeal is woefully inadequate.<sup>5</sup> See *State v. Dietzen*, 164 Wis. 2d 205, 212, 474 N.W.2d 753 (Ct. App. 1991) (appellant responsible for assembling and submitting record). The record includes Bruckner’s handwritten exhibit demonstrating payments McGrath made from September 2015 until June 2016, noting that no payments were made in May or June 2016. Also in the record is a letter from McGrath explaining his difficulties with rental assistance and alleging dates for some payments. Bruckner claims in his response brief that “McGrath was given an opportunity by [the circuit court] to present evidence of payments in addition to the payments ... admitted to by Bruckner [in court]. Upon extensive questioning by [the circuit court], McGrath presented no additional receipts or evidence of additional payments.” The record does not include a copy of the transcript from the eviction hearing. Where the record is incomplete, we must assume that the omitted material supports the circuit court’s decision. See *State Bank of Hartland v. Arndt*, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986).

¶6 On appeal, McGrath included receipts in the appendix of his brief in chief, suggesting at least a small partial payment of the May 2016 rent on May 24, 2016. First, these receipts are not in the record; the appendix is not the record. *United Rentals, Inc. v. City of Madison*, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322. Second, this court is an error correcting court. *Cook v. Cook*, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997). We are not an appropriate venue to retry a case with evidence that was not presented to the

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<sup>5</sup> McGrath filed a motion to supplement the record with this court, seeking to enter a CD into the record containing a recording of an alleged telephone call that he discusses in his brief. We denied McGrath’s request as McGrath admitted that the contents of the CD were not before the circuit court and he failed to provide a copy to Bruckner.

circuit court or derived from the record. The circuit court “is the ultimate arbiter of the credibility of witnesses” and we will defer to the circuit court on issues of credibility. *See Rivera v. Eisenberg*, 95 Wis. 2d 384, 388, 290 N.W.2d 539 (Ct. App. 1980). As this case involves conflicting testimony and the appellant fails to provide us with a transcript, we accept the circuit court’s finding that McGrath failed to pay rent and that Bruckner was entitled to a judgment of eviction.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

